

## BRIEF IN SUPPORT OF PETITION

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### Opinions of the Court Below

The date of the decision of the Circuit Court sought to be reviewed herein is December 26, 1944. No opinion was filed by the Circuit Court of Appeals for the Second Circuit in denying the petition for the review and setting aside of its judgment.

### Jurisdiction

Statute under which jurisdiction is invoked is Section 347 (Judicial Code, 28 U. S. C., Section 240, Amended) (a).

In accordance with Rule 38 of this Court cases believed to sustain the jurisdiction because of conflicts with decisions of this Court or between Circuits, or because undecided important questions of Federal law are involved, are:

*Ivory Novelties Trading Company, Inc. v. Francois Joseph De Sportuno Coty*, 276 U. S. 159; *Powers-Kennedy Contracting Corp. v. Concrete Mixing etc. Co.*, 282 U. S. 175, 176; *Saranac Automatic Mach. Corp. v. Wirebounds Patent Co.*, 282 U. S. 704, 705; *DeForest Radio Co. v. General Electric*, 283 U. S. 664; *Muncie Gear Works v. Outboard Marine & Mfg. Co.*, 315 U. S. 759; *Williams Mfg. Co. v. United Shoe Machinery*, 316 U. S. 364; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173; *Reynolds v. United States*, 292 U. S. 443; *Southern Railway Co. v. Walters*, 284 U. S. 190.

### Statement of Case

The case, so far as material to the consideration of this application, is stated in the petition (pp. 2, 3, 4).

## **Specification of Errors**

The errors which petitioner will urge if a writ of certiorari is granted are that the Circuit Court of Appeals for the Second Circuit erred in denying the petition for the following reasons:

- (1) That the Circuit Court was not barred from exercising jurisdiction by the decision of the Supreme Court in the case of *R. Simpson & Co. v. Commissioner*, 321 U. S. 325, or any other pertinent decision.
- (2) That the Circuit Court should have granted the petition under the authority of *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U. S. 238, and other applicable decisions.

## **Summary of Argument**

The points of argument support in order the reasons relied upon for the allowance of the writ.

## **ARGUMENT**

### **POINT I**

**An important question of Federal law is involved which has not been but should be settled by this Court in the public interest.**

Denial of the petition by the Circuit Court based upon the objection raised in the respondent's answer, to the effect that under the authority of the *Simpson* case (supra), decided by this Court, the Circuit Court lacks jurisdiction, involves a question of Federal law important to the administration of justice and of the tax laws.

Specifically, whether or not taxpayers, after a tax judgment has become final under the provisions of Section 1140 of the Internal Revenue Code, are barred from instituting proceedings in equity to set aside grossly unjust judgments, *and particularly where the material facts are not disputed and the gross injustice is conceded*, is a question which has never been decided by this Court and its importance in the administration of justice is apparent. Did Congress, by the enactment of Section 1140 of the Internal Revenue Code, intend to exclude taxpayers from seeking relief from such judgments upon recognized equitable grounds?

To put the question another way: Are *taxpayers* suffering from concededly grossly unjust judgments excluded from the application of the remedial principles and procedure approved by this Court in the *Hazel-Atlas Glass Company* case (*supra*) and is such the import of the decision of this Court in the *Simpson* case?

It would not seem that the *Simpson* case decided any such question. The *Simpson* case did not involve a petition in equity for the review, on recognized equitable grounds, of an erroneous judgment manifestly unconscionable or grossly unjust. The Supreme Court in the *Simpson* case merely decided that "where under our rules our denial has become final", in conjunction with Section 1140 of the Internal Revenue Code defining finality in tax cases, it did not have jurisdiction *in the normal course of appeal procedure* to grant a rehearing of a petition for a writ of certiorari previously denied by it, the time for such an application having expired,—the Court pointing out that the intent of Congress in defining finality with reference to appeal procedures was to determine a time when the right of collection, suspended during appeal, begins to run again and assessment and collection may be made by the Commissioner.

This would seem to be a far cry from deciding in an extraordinary proceeding involving the review of a judg-

ment by the Circuit Court pursuant to inherent equity powers that Congress intended to render inapplicable *in the case of taxpayers* fundamental and long established equitable principles and procedure designed to prevent gross injustice caused by erroneous judgments. It would not appear that this Court either stated or implied any such conclusion. The Circuit Court by its denial of the petition based upon the respondent's answer has thus construed the *Simpson* case and, in effect, has imputed to Congress, from the language of Section 1140 of the Revenue Code designed to fix the time when assessment and collection can commence, a radical intent to single out the great body of taxpayers and deny to them ancient rights based upon basic considerations of equity and justice. Such an interpretation of the statute would seem to violate recognized canons of statutory construction.

The proceeding herein is extraordinary in its nature, the petition invoking the high equity powers of the Circuit Court to prevent a miscarriage of justice. The petition is in the nature of a bill for the review of and to set aside a judgment *concededly* grossly unjust and manifestly unconscionable because of fundamental error apparent on the face of the opinion of the Court, because of accident or mistake unmixed with negligence on the part of the petitioner, the error being confirmed by the additional evidence which through no lack of diligence on the part of the petitioner was not available at the hearing and had it been would doubtless have resulted in a judgment disallowing the deficiency assessment.

In the light of the broad pronouncements of this Court in the *Hazel-Atlas Glass Company* case, based upon a wealth of precedent, have, either under the *Simpson* or the *Monjar* cases, taxpayers been excluded from the right to petition in equity for relief from grossly unjust judgments, or did Congress, by the enactment of Section 1140 of the Internal Revenue Code, intend such a deprivation no matter how admittedly erroneous the decree or how concededly gross the resulting injustice?

## POINT II

### **There is a conflict on the same matter between decisions of Circuit Courts of Appeals.**

Denial of the petition by the Circuit Court, based upon the objection raised in the respondent's answer to the effect that under the authority of the *Monjar* case (supra), decided by the Second Circuit Court, that it lacks jurisdiction, is apparently in conflict with the decision of the Fifth Circuit Court in the *Buttengenbach* case (supra) involving the same matter.

Counsel for the respondent, in the answer, cited the *Monjar* case (supra), decided by the Second Circuit, as authority for a denial of the petition with respect to which the Circuit Court apparently agreed. In its opinion in the *Monjar* case the Second Circuit Court referred to and declined to follow the *Buttengenbach* case (supra), decided by the Fifth Circuit Court. Both these cases involved appeals to the Circuit Court from the denial of motions made by the taxpayer to the Tax Court, after the lapse of the thirty-day period, to reopen the cases for redetermination. The denial by the Tax Court was upheld by the Second Circuit Court in the *Monjar* case and was reversed by the Fifth Circuit Court in the *Buttengenbach* case.

It is of interest to note that in allowing the case to be reopened after the thirty-day period had elapsed, the Fifth Circuit Court in the *Buttengenbach* case expressed itself in terms of equitable principles pertinent to the review and setting aside of a judgment. In the *Buttengenbach* case the deficiency assessment erroneously resulted from the taxpayer's "reliance upon the mistaken advice of a revenue agent", the respondent Commissioner agreed that an injustice was involved and, while respondent's counsel raised the jurisdictional point, did not oppose as to the merits. The motion to reopen the case was made after the thirty-day period. The Tax Court denied the motion and,

on review, the Fifth Circuit Court reversed and stated in its opinion:

"The reviews mentioned in Section 1005 no doubt measure the taxpayer's right to litigate and the Board's decision is final on exhaustion or neglect of them as against further appeals. But it does not follow that the decision may not be further dealt with by the Board itself in its discretion *or that no extraordinary relief against it can ever be had*. Decisions of the Secretary of the Interior in matters affecting the public lands were by statute declared to be final *but that meant only to further appeals, and did not exclude the courts from inquiring in extraordinary cases whether the law had been violated thereby*. *Johnson v. Tousley*, 13 Wall. 72, 83, 20 L. Ed. 485." (Emphasis ours.)

### POINT III

**The Circuit Court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.**

Denial of the petition by the Circuit Court, based upon the objection raised in the respondent's answer to the effect that the *Hazel-Atlas Glass Company* case (supra), decided by this Court, is limited to fraudulently begotten judgments, is apparently in conflict with the decision in that case.

(a) The *Hazel-Atlas Glass* case was decided by the Supreme Court May 15, 1944. The decree reviewed and directed to be reversed had become final nine years before. Its procurement involved fraudulent testimony. The matter was presented to the Circuit Court (C. C. A., 3rd) by a petition to that Court to review and set aside its judgment. The Circuit Court denied the petition and an appeal was taken to the Supreme Court. The Supreme Court reversed and directed the Circuit Court of Appeals to reverse its judgment and render judgment for the petitioner. This decision of the Supreme Court simplifies

and renders more speedy and flexible remedial action, pursuant to petitions in equity to review and set aside decrees under extraordinary circumstances resulting in gross injustice. Specifically, Circuit Courts of Appeals are empowered and, when the material facts are not in dispute, it is their *duty* to administer and execute such remedial action which considerations of equity and justice in the particular case and under the circumstances demand. While the decision of the Circuit Court denying the petition apparently upholds the respondent's answer that such relief must be predicated upon grounds of fraud,—“fraudulently begotten judgment”,—such is not the law as the Supreme Court in its opinion, both majority and minority, clearly indicates,—based upon a long history of adjudications both in England and this country. *Fraud is but one of the circumstances* upon which equity will vitiate the decree, the opinion stating the rule comprehensively as follows:

“From the beginning there has existed alongside the term rule a rule of equity to the effect that *under certain circumstances, one of which is after discovered fraud*, relief will be granted against judgments regardless of the term of their entry. This equity rule which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. \* \* \* But where the action is demanded, *where enforcement of the judgment is ‘manifestly unconscionable’* \* \* \* they have wielded the power without hesitation.” (Emphasis ours.)

(b) The error, apparent in its opinion, having been made by the Circuit Court, the material facts not being in dispute, and the gross injustice of the judgment being conceded, was it not the *duty* of the Circuit Court to grant the petition in accordance with the principles and procedure approved by this Court in the *Hazel-Atlas Glass Company* case?

This Court in the *Hazel-Atlas Glass Company* case stated:

“ \* \* \* Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.” (Emphasis ours.)

In order to implement these principles this Court approved of the procedure whereby the equity powers of the Circuit Court were invoked by a petition asking that Court to hear and determine the matter. In situations where the facts are not in dispute, and it is clear that the judgment is grossly unjust, this Court held that the Circuit Court should, as a matter of duty, act forthwith. The opinion states:

“Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed, the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require, argues against it. We hold, therefore, that the Circuit Court on the record here presented, had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions.”

### SUMMARY

The bald fact is that, through sheer error apparent on the record, the judgment sought to be set aside involves an unjust tax of over \$100,000. The respondent Commissioner, honestly disposed, concedes the error and would correct it had he authority to do so. The denial of the petition by the Circuit Court leaves the Commissioner no choice but to enforce collection not of a tax properly due but what is tantamount to a legalized exaction. Should not the Circuit Court, under the circumstances, be able to correct its mistake and thus prevent the miscarriage of justice? Or

must the grave error, once made, forever stand and the gross injustice be perpetrated? Is such a result a concomitant of Congressional intent in the enactment of 1140 of the Internal Revenue Code? And is such a statutory construction in the true interest of the administration of public law? If so, it does violence to long established principles of equity and revolts the sense of justice. Why in the case of taxpayers should a judgment concededly erroneous and manifestly unconscionable be beyond the remedial reach of the Court which rendered it?

The questions involved are of fundamental importance. Every consideration would seem to render appropriate, under the rules of this Court, a review of the Circuit Court's decision.

Respectfully submitted,

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Counsel for Petitioner.

February, 1945.

